



BEFORE THE
COMPETITION COMMISSION OF PAKISTAN
IN THE MATTER OF
SHOW CAUSE NOTICES ISSUED TO

Mr. NIMKO CORNER
M/s KARACHI NIMCO
On complaint filed by
M/S. NIMCO CORNER

(File No. 295/Nimco Corner/OFT/CCP/2017)

Date(s) of Hearings:

01-10-2019 and
05-12-2019

Commission:

Dr. Muhammad Saleem
Member

Dr. Shahzad Ansar
Member

Ms. Bushra Naz Malik
Member

Present:

Mr. Aarsal Ikram
Assistant Director (Legal)

M/s Nimco Corner

Barrister Abdur Rehman,
Vellani & Vellani

Mr. Nimko Corner

Nemo

M/s. Karachi Nimco

Mr. Haseeb Zafar, Advocate
Zafar & Associates

Ms. Warda Bhatti, Advocate
Zafar & Associates

Mr. Hannad Din Ch. Advocate
Zafar & Associates



ORDER

1. This order shall dispose of proceedings arising out of Show Cause Notices (the 'SCNs') No. 14/2019 & 15/2019 dated 12 July 2019, issued to Mr. Nimko Corner (**Respondent No. 1**) and M/s Karachi Nimco (**Respondent No. 2**), respectively and hereinafter collectively referred to as the '**Respondents**', for *prima facie* violation of Section 10 of the Competition Act 2010, (the '**Act**').
2. SCNs were issued to the Respondents pursuant to Enquiry Report dated 15 February 2019 (the '**Enquiry Report**') which was conducted on a complaint filed by M/s Nimco Corner (the '**Complainant**'), wherein the Complainant alleged that the Respondents have disseminated false and misleading information by using virtually identical firm names, trademarks and copying of distinctive item of product packaging, which amounts to deceptive marketing practices within the meanings of Section 10 of the Act.

FACTUAL BACKGROUND

A. COMPLAINT, ENQUIRY AND SHOW CAUSE NOTICES

3. In its complaint, the Complainant stated that they have been carrying out business of processing, marketing and selling food items such as fried lentils, *Chewra*, *Dall mooth*, coated nuts and chips etc. (hereinafter collectively referred to as the '**Snack Food**') under the firm name Nimco Corner. The Complainant has claimed to have trademark of 'NIMCO' since 1947, as well as, distinctive logos and packaging, which are designed to be used in connection with its goods not only in Pakistan but throughout the world.
4. The description of the logo, trademark and packaging of the Complainant, as provided along with the Complaint are as follows;

<p>COMPLAINANT</p> <p>Firm Name NIMCO CORNER</p> <p>Logo in English</p> 	<p>Logo in Urdu</p> 
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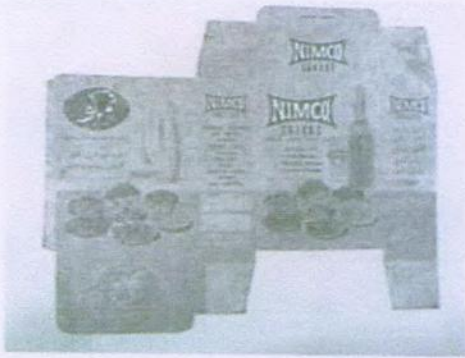
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COMPLAINANT

Copies of Trade Marks as Applied



Registered since 1972



As Registered since 1970.

COMPLAINANT

Packaging (front)



Close-up



Close-up (reverse side)



Packaging (front)



Packaging (reverse side)



5. From bare perusal of the aforesaid trademarks, logo and the packaging material of the Complainant, it is evident that the same is in the distinctive color scheme of red, yellow and blue, with the tagline '**Original Brand since 1947**' written along with the Nimco Corner logo (i.e. "NIMCO" written in unique white font inside a red rectangle along with "Corner" written below it in red), the "Nimco Snacks" logo in Urdu (i.e. a red oval with the words "Nimco Snacks" in white), a tea pot, a tea cup and saucer, a blue and white striped device with names of the snack foods in circle and address of the Complainant below, words such as "FRESH CRISPY TASTY", "TAAZA, KHASTA AUR LAZEEZ", "DAAWAT, ISRANA, TAQREEB-E-SAALGIRA AUR PICNIC PARTIES KE LIYE BEHAD MARGHOOB", and "OLD SPICE SNACKS". (Hereinafter collectively referred to as "**Product Packaging**").
6. The product packaging described above is also claimed to be a registered trademark of the Complainant, both in English and Urdu since 1970 and 1972, respectively. The Commission initiated an enquiry under Section 37(2) of the Act which was concluded *vide* Enquiry Report dated 15 February 2019 (hereinafter the '**Enquiry Report**'). After considering all the material available on record, it concluded as follows;

8.1: In the light of the facts, it appears that the conduct of the Respondents, prima facie, amounts to passing off its products as that of the Complainant's through fraudulent use of Complainant's trademark, packaging, color scheme, design and get up of products, in violation of section 10(1), in terms of section 10(2) (d) of the Act, which prohibits fraudulent use of another's trademark, firm name or product labeling or packaging.

8.2: In view of the analysis, it also appears that the conduct of Respondents, prima facie, has the potential to inflict harm upon the goodwill and business interests of the Complainant and cause confusion among customers through dissemination of false and misleading information related to character, properties and quality of goods via similar/identical packaging, in violation of section 10(1), in terms of section 10(2) (a) & (b) of the Act.



8.3:Therefore, in the light of the above mentioned findings, it is recommended that the Commission may consider initiating proceedings against M/s Mr. Nimko Corner and M/s Karachi Nimco under section 30 of the Act.”

7. Based on the above *prima facie* findings of the Enquiry Report, the Commission initiated proceedings under Section 30 of the Act and issued Show Cause Notices to the Respondents. The relevant parts of the SCNs are reproduced hereunder;

“4. *WHEREAS, in terms of the Enquiry Report in general and paragraphs 2.32 to 2.39, it has been alleged by the Complainant that Undertaking with intention to deceive the unwary consumers and took unfair advantage of the reputation and goodwill, used the Complainant’s firm name, packaging and NIMCO trademarks for itself without any authorization (express or implied), which prima facie, constitutes violation of Section 10(1) of the Act; and*

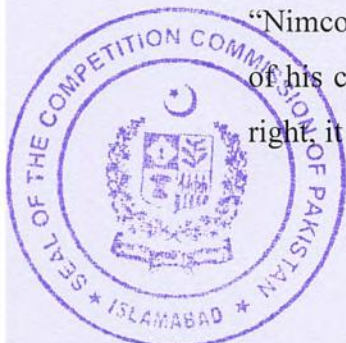
5. *WHEREAS, in terms of the Enquiry Report in general and paragraphs 7.33 to 7.56 & 7.62, in particular, it appears that the Undertaking fraudulently and without any authorization express or implied, used the Complainant’s registered trademarks NIMCO and firm name, without any consent or authorization, which is in prima facie constitutes violation of Section 10 (1), in terms of Section 10(2)(d) of the Act; and*

6. *WHEREAS, in terms of the Enquiry Report in general and paragraph 7.64 to 7.68 in particular, it appears that the Undertaking’s conduct of infringing upon the rights of the Complainant’s trademark, firm name is not only capable of harming the business interests of the Complainant but the Undertaking is also distributing false and misleading information to consumers related to the manufacturer of the products, character, properties and quality of goods, which is prima facie in violation of Section 10(1) in terms of Section 10(2)(a) & (b) of the Act; and”*



B. HEARINGS, WRITTEN AND ORAL SUBMISSIONS OF THE PARTIES:

8. The Respondents, vide SCNs, were called upon to respond in writing within fourteen (14) days of the SCNs and to avail the opportunity of hearing on 6 August 2019. The hearing so scheduled was adjourned on the request of Complainant. Subsequently, hearing was rescheduled twice but was adjourned on the request of Respondents. However, a written reply to the Show Cause Notice was submitted by Respondent No. 2 on 23 October 2019, whereas, no reply to SCN was submitted by the Respondent No. 1. Finally, hearing in the matter was fixed for 5 December 2019. Despite repeated notices to Respondent No. 1, no one appeared or submitted any reply on its' behalf, hence, in accordance with the provisions of Regulation 26(2)(e) of Competition Commission (General Enforcement) Regulations, 2007 (hereinafter the '**GE Regulations**'), we deem it appropriate to proceed *ex-parte*.
9. The counsel for Complainant appeared and reiterated the facts which he had already asserted in his Complaint. In order to help the Commission to have a comparative analysis of both packaging, he presented original product packaging of the Complainant as well as alleged product packaging of the Respondents. He explained in detail how the alleged fake product packaging has copied the color scheme, design language, taglines and their placement, shapes and overall trade dress of the Complainant. He also stated that the alleged trademarks and their color scheme is confusingly and deceptively identical to Complainant's trademarks, therefore, it amounted to "*parasitic copying*" or "*copycat*". He relied, in this regard, upon Commission's earlier decision in the case of violation of trademark of **M/s DHL Pakistan Private Limited** reported as **2014 CLD 1014** and **in the matter of Show Cause Notice issued to A. Rahim Foods** reported as **2016 CLD 1128**. He further asserted that the Complainant is the owner of two trademarks. No to mention, the previous trademarks were to lapse in 2018, but Complainant got it renewed for another tenure; this clearly shows the vigilance and conduct of the Complainant. Moreover, all other applications for registration of trademark identical to Complainant's trademark have already been rejected by Trademark Registry Office, hence, the Complainant is the sole owner of the trademark "Nimco". As an evidence, he presented Trademark Registration Certificates in support of his claim. He stated that, despite the fact that the Respondent holds no trademark right, it is still adamant to mislead consumer by posing itself as a registered trademark



owner. A mark “®”, which is a symbol of registered trademark, is evident on Respondents packaging and it reflects a violation of the law.

10. Additionally, he argued that the Complainant invested tremendously in establishing its reputation and goodwill in the market and earned the status of a well-recognized Nimco brand. In order to substantiate this claim, he presented as evidence an article from a newspaper called “the Express Tribune”, excerpts from other newspapers, snapshots of feedback from other online platforms such as “Facebook”, “Twitter”, and “Pictame” etc. In this context, he argued, the Respondents are trying to get free ride over Complainant’s goodwill, undue business advantage and trying to reap the fruits of investment which they have not actually made. Based on submission made before us, the counsel for Complainant requested for issuance of an order, restraining the Respondents therein from displaying false or misleading information to the customer, distributing such offending product packaging which is confusingly similar to Complainant’s packaging and copying firm name or trademarks which are phonetically or graphically similar to Complainant’s firm name.

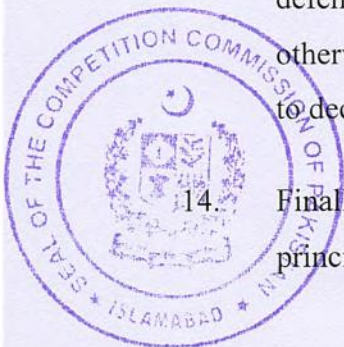
11. The counsel appeared on behalf of Respondent No. 2 and contested the case at length. He asserted that the case is not maintainable, malicious and filed with the intent to cause harm to the Respondent No. 2. He also raised questions to Enquiry Report and alleged it to be baseless and harmful to legitimate business of the Respondent No. 2. However, he was unable to substantiate such assertions. He further discussed the generic nature of the word “NIMCO” and stated that it falls within the category of “*Genericism*”; a concept in Intellectual Property Laws, wherein, a protected trademark becomes a common name for product for which it is being used. For example, SURF, BASMATI RICE, LINOLEUM, KLEENEX, CELLOPHANE etc. Likewise, NIMCO is also a generic word, used for dry, spicy and salty foodstuff. In intellectual property laws, he emphasized, a trademark must have a distinctive character to secure a trademark right over it. If it losses that distinctive character and the word comes in public domain, it no longer fulfills the criteria of a trademark right. Hence, it is no longer liable to be protected. Therefore, the counsel argued that, the word “NIMCO” in the instant case is also in public domain and a number of competitors are using this word to represent their products. Hence, being in public domain, it is not worthy of protection.



12. He further contended that the Complainant has failed to establish its connection with the word “NIMCO” and what role it has played in establishing its recognition nationwide. Since the Complainant cannot derive any right over this word, therefore, the Complainant has tried to deceive the Commission into believing that the Complainant is the sole proprietor of “NIMCO”. Whereas in reality, it is a generic word. Moreover, the Respondent is in the business of snack food production for more than fifty years and he needs no authorization from Complainant before using a generic word. In addition to that, he brought the Commission’s attention toward another concept called “Common to trade trademarks”. He defined it as a trademark, which no longer fulfills the essential function (i.e. designation of origin of goods/services for a particular trade) becomes generic for that particular trade, and eventually, it ceases to fulfill criteria of distinctiveness. Such trademarks are not protectable under the law. He quoted case law in this respect, **Master Tiles Mills Ltd v Master Fabric** reported as **2007 CLD 991 Khi**, wherein the court accepted the concept that if a particular trademark is common to the trade and used by more than one person, it becomes public juris and all traders in the field can claim their right in the said trade mark. In another European case relied by Respondent, **Backaldrin Osterreich The “Kornsitz” Company GMBH v Pfahl Backmittel GMBH, [2014] EUECJ C-409/12**, it was held that a trademark is liable to be revoked if that trademark has become a common name, not according to the perception of sellers but, to the perception of end users.

13. Furthermore, the counsel of Respondent No. 2 also stated that the trademarks of both Complainant and Respondent No. 2 fall under the category of “Composite Trademark”; a trademark whose characterizing element and other elements, such as prefixes and suffixes, are not distinctive. However, the distinctive value of both characterizing element and other elements is derived, in a more or less accentuated way, only by their combination, or indeed, as a whole. In this context, relied upon another case law, **Hero Motor Ltd v Babar Trading and Manufacturing Company** reported as **2010 CLD 22**, wherein the plaintiff sold its product under the name of “Hero” whereas the defendant sold under the name of “Asia Hero”. The court held the word “Hero”, otherwise descriptive and being employed generally across the board, does not amount to deception in the mind of public.

14. Finally, the counsel concluded his arguments by resorting to principle of Laches and principle of Acquiescence under Trademark Ordinance, 2001 (the ‘**TM Ordinance**’).



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He argued that the Complainant is barred by law from taking action since the Complainant has not agitated the matter before despite the fact that the Respondent No. 2 has been using the word since long. Therefore, the principle of laches applies here. According to the case law cited as **Al-Karam Textile Mills vs. Mehtab Chawla**, reported as **2007 CLD 966**, while application of principle of laches, the balance lies in favor of defendants. Moreover, as per Section 81 of the TM Ordinance, the Complainant is also barred by law from taking any action at this stage since he has not taken action against Respondents before and kept quiet for more than five years. Therefore, the principle of Acquiescence under Section 81 of the Trademark Ordinance, 2001, applies here.

15. Arguments heard and record perused.

ANALYSIS & DECISION

16. Since no one appeared on behalf of the Respondent no. 1 and the Bench has proceeded *ex-parte* against him. In the instant matter, the Respondent No. 1 though have filed written reply to the enquiry committee, however, it have deliberately avoided to appear before us and avail the opportunity of hearing given to them under Section 30 of the Act. Despite the foregoing, in line with the dictum of the August Supreme Court of Pakistan in the case **Rehmat Ali vs. Additional District Judge, Multan and others**, reported as **1999 SCMR 900**, wherein it was observed by the August Court that *“decrees granted against the absentees, without consideration of available record or application of mind vis-à-vis the evidence available on the record have always been looked upon with disfavour by the superior courts”*, we deem it appropriate to carry out the analysis of the evidence available on the record in order to reach a just conclusion.
17. Based on the material available on the record i.e. the Enquiry Report, SCN and the written replies filed by the Respondent No. 2 following issue arise for determination:
- (i). *Whether the complaint is time barred?*
 - (ii). *Whether the complaint is filed maliciously or with mala fide intent?*
 - (iii). *Whether the defence of Genericism is available to Respondents vis-à-vis the word “NIMCO”?*



(iv). *Whether the Respondents have violated section 10 of the Competition Act?*

18. In the preceding paragraphs, we will now proceed to analyze the aforesaid issues in terms of the evidence available on record along with the submissions made before us.

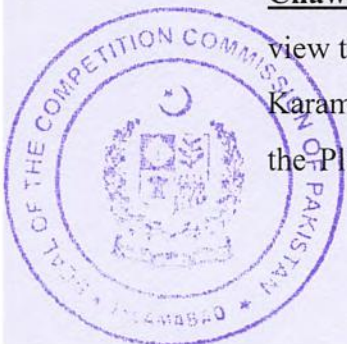
Issue No.1: Whether the complaint is time barred?

19. In the reply to the SCN, the Respondent No. 2 stated that the Complainant kept silence for several years and did not raise any objection to the infringement of its rights when the Respondent No. 2 was commercializing its business activities under the name and style of “Karachi Nimco”. Therefore, raising objection at a later stage is barred by time. During his arguments, the Respondent No. 2 also relied upon the principle of Laches. This is to be made clear that the complaint under consideration was filed under Section 37 (2) of the Act, which is reproduced hereinafter for ready reference:

“37(2): Where the Commission receives from an undertaking or a registered association of consumers a complaint in writing of such facts as appear to constitute a contravention of the provisions of Chapter II, it shall, unless it is of the opinion that the application is frivolous or vexatious or based on insufficient facts, or is not substantiated by prima facie evidence, conduct an enquiry into the matter to which the complaint relates.”

20. Neither the in Section 37 (2) of the Act, as mentioned above, nor in any other section in the Act puts any time limitation when to file a complaint for violations thereof. Even otherwise, we are of the view that the application of the Act is not only extendable to violations occurring in present, but also, to the violations occurred in past. Any person violating any provisions of the Act cannot be allowed to get away with his violation merely on the fact that the time has lapsed.

21. Further, the Respondent No. 2 has relied upon **Al-Karam Textile Mills vs. Mehtab Chawla**, reported as **2007 CLD 966**, we have reviewed the case and are of the firm view that the facts in the relied case are distinguishable from the instant matter. In *Al-Karam Textile Mills supra* the Defendant was a prior user of the trademark and while the Plaintiff was dealing with the Defendant much before initiation of proceedings



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under the TM Ordinance never objected to the use of registered trade mark by the Defendant. It is also worth mentioning that the proceedings in the referred judgment were filed under the TM Ordinance. However, in the instant matter no evidence has been produced by the Respondent No. 2 that they are prior user of the trademark and packaging material in question. In fact, the Respondent No. 2 has acknowledged the ownership of the trademark and logo in question by the Complainant. Hence, the judgement relied upon by the Respondent No. 2 is not attracted in the instant matter being distinguished.

22. The Counsel for Respondent No. 2 has also placed reliance on Section 81 of the TM Ordinance, and has alleged that the violations by the Respondent No. 2 was in the knowledge of the Complainant for over five years and the Complainant has not taken any action. For ease of reference, the provisions of Section 81 of the TM Ordinance is reproduced herein below:

81. Effect of acquiescence.- (1) Where the owner of an earlier trade mark, or other earlier rights, has acquiesced for a continuous period of five years from the date of registration in the use of a registered trade mark in Pakistan, being aware of that use, there shall cease to be any entitlement on the basis of that earlier trade mark or other right- (emphasis added)

(a) to apply for a declaration that the registration of the later trade mark is invalid; or

(b) to oppose the use of the later mark in relation to the goods or services in relation to which it has been so used. Unless the registration of the later mark was applied for or used in bad faith.

(2) Where sub-section (1) applies, the proprietor of the later trade mark shall not be entitled to oppose the use of the earlier trade mark or as the case may be, the exploitation of the earlier right, notwithstanding that the earlier trade mark or right may no longer be invoked against his later trade mark.

23. The onus to discharge the burden of prior knowledge was upon the Respondent No. 2, however, no evidence is presented by the Respondent No. 2 to affirm the prior



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knowledge of infringement for over five years. Hence, the critical pre-condition to attract the provisions of Section 81 of TM Ordinance is missing in the instant case. Further, we cannot ignore that the instant proceedings are under the provisions of the Act and not under TM Ordinance. The Commission has exclusive jurisdiction to take action and adjudicate on any matter provided in the Act. Further, reference is made to the provisions of Section 59 of the Act, which for ease of reference are reproduced herein below:

59. Act to override other laws. — *The provisions of this Act shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force.*

24. From the bare perusal of the above provision, it is clear that the provisions of the Act shall have an overriding effect on any other law for the time being enforce, which inter alia include the TM Ordinance. Foregoing, in view, we are of the considered opinion that the objection raised by the Respondent No. 2 *vis-à-vis* Section 81 of the TM Ordinance and laches is not tenable and is hereby rejected.

Issue No.2: Whether the Complaint is filed with malicious and mala fide intent?

25. The Respondent No. 2, during arguments and its written reply, asserted that Complaint under consideration is superfluous and is filed owing to the personal vendetta and business rivalry. He also asserted that the allegation levelled in the complaint were intended to harm business reputation of the Respondent No. 2.
26. From the submissions made before us, it is clear that the allegations of mala fide have been levelled by the Respondent No. 2 against the Complainant for filing of the Complaint. It is a settled principle of law that *mala fide* is to be proved through independent and cogent evidence, mere allegation are not sufficient. For the foregoing we place reliance on the case of **Zulfiqar Ali vs. Province of Punjab**, reported as **2018 PLC (C.S) 842**. In addition to the foregoing, we also refer to the case of **Shafi Mohammad vs. State**, reported as **2017 YLRN 317**, wherein it was held that the burden of proof is on the one who alleges *mala fide* on part of Complainant or the investigation agency.



27. We would like to make it clear that exercising any legal right available to a person through quasi-judicial forum, such as the Commission, does not amount to business rivalry. The purpose of Section 10 of the Act is to provide a remedy to an aggrieved person whose rights have been infringed by another by resorting to deceptive marketing practices being an unfair mean of distorting competition. Even otherwise, if there happens to be a wrong complaint then the Act provides a mechanism, such as enquiry process under Section 37 of the Act, to scrutinize the compliant and check its veracity. This is not all, the Act even further provides a due opportunity to the person against whom a complaint is filed to appear and produce his defense. In the presence of such an extensive process, it is not correct to suggest that mere exercise of a legal right amounts to personal vendetta. Further, apart from the submission no other evidence was submitted by the Respondent No. 2 in support of its submissions *vis-à-vis* the *mala fide* on part of the Complainant. We, therefore, find no force in Respondent No. 2's argument in this regard. Hence, complaint is held to be maintainable and filed with *bona fide* to protect the rights of the Complainant in accordance with law.

Issue No. 3: Whether the defence of Genericism is available to Respondents *vis-à-vis* the word "NIMCO"?

28. The gist of arguments from Complainant side is that the word "NIMCO" is their registered trademark and copying of this word, in any manner whatsoever, which inter alia include the use of word "NIMCO" in conjunction with other words and parasitic copying of packaging material amounts to infringement of Complainant's intellectual property rights and fraudulent use of trademark as well as the packaging material in violation of Section 10(2)(d) of the Act. On the other hand, the gist of the Respondent's arguments is that the word "NIMCO" is generic and common to trade trademark, hence, nobody can claim any right over this particular generic word.

29. The certificate of registration of trademark is produced by the Complainant and it shows that the Complainant got its trademark registered in the year 1972 and also obtained copyrights for its packaging the trademark and packaging of Complainant shows that a trademark is granted to the Complainant, separately in both languages i.e. Urdu and English, for its overall complete packaging, its unique patterns, colour schemes, font style, shapes, taglines and their placement, the images whereof are reproduced in Para 4 *ibid*. In Complainant's original packaging, the word "NIMCO" is written in large font



size whereas “SNACKS” is written in relatively smaller font size. The Counsel for the Respondent No. 2 has argued that the word “NIMCO” falls within the category of “*Genericism*”; a concept in Intellectual Property Laws, wherein, a protected trademark becomes a common name for product for which it is being used. For example, SURF, BASMATI RICE, LINOLEUM, KLEENEX, CELLOPHANE etc., in support fo his submissions he relied upon **Hero Motor Ltd v Babar Trading and Manufacturing Company** reported as **2010 CLD 22**, wherein the plaintiff sold its product under the name of “Hero” whereas the defendant sold under the name of “Asia Hero”. The court held the word “Hero”, otherwise descriptive and being employed generally across the board, does not amount to deception in the mind of public. He also placed reliance on a case of European Court of Justice i.e. **Backaldrin Osterreich The “Kornsitz” Company GMBH v Pfahnl Backmittel GMBH, [2014] EUECJ C-409/12**, wherein the Court held that a trademark is liable to be revoked if that trademark has become a common name, not according to the perception of sellers but, to the perception of end users. Apart from the foregoing, the Respondent No. 2 has not placed any other material on record, which may inter alia include the dictionary meaning of ‘NIMCO’ making it a generic term. On the other hand the Complainant has produced the Trademark and copyrights registration certificates along with the packaging and an article published in Express Tribune under the title ‘Nimco: Old Spice’ dated 30 June 2013. Further, the Complainant has also placed on record various objections filed by them opposing the registration of any trademark containing the word “NIMCO”.

30. We have reviewed the material available on the record. We note that the reliance placed on **Hero Motor Ltd v Babar Trading and Manufacturing Company** reported as **2010 CLD 22**, by the Respondent No. 2 is misplaced. In the said case the dispute between the parties was with reference to the word ‘HERO’. The Honorable Sindh High Court held that the “...the word ‘HERO’ is otherwise descriptive and is being employed generally across the board.” Hence, the Court refused to extend the protection to the Applicant in lieu of the word ‘HERO’. After carefully reviewing the foregoing case law we are of the view that this case is not applicable in the matter, as the word hero is a generic word having dictionary meaning and this particular defense was therefore, appreciated by the Court. In the instant matter the Respondent No. 2 though has referred to SURF, BASMATI RICE, LINOLEUM, KLEENEX, CELLOPHANE etc., and claimed that these terms have become descriptive in nature and are protected under



Genericism, however, no case law is referred in this regard by the Respondent No. 2. On the other hand we would like to refer **Societe Des Produits Nestle S.A. vs. Food International (Pvt.) Limited**, reported as **2004 CLD 1383**, which clearly negates the arguments raised by the Respondent No. 2 in its defense vis-à-vis the Genericism. In the referred case Nestle challenged the use of word 'Milo' by Food International for its bread. The Court held that:

14. The argument of the Learned Counsel for the Respondent that the word 'Milo' is not an invention of the Appellant and is generic signifying a kind of grain, is also of no substance for the reason that the bread produced by the Respondent is not the product of milo grain but is made of wheat, therefore, the word 'Milo' with reference to grain cannot be made justification for the use of the registered trade mark of the Appellant by the Respondent. The known use of Milo grain for the production of the bread has been admitted before us by the Learned Counsel for the Respondent in answer to our query.

...

16. As a matter of law and public policy it would be the duty of the Court to ensure that once a trademark has been duly registered and nurtured through advertisements and other means and has remained firmly stabilized for a long period it should not be allowed to be abruptly eradicated by imitating such trademark. If this sense of security is not guaranteed to an owner of a registered trademark and if uncertainty about its future is allowed to remain, no productive growth which is most desirable in every field of activity of a civilised society would be possible. (Emphasis added)

31. The case law from the European Jurisdiction relied upon by the Respondent No. 2 is also not relevant; as it merely interpreted the Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks, with reference to revocation of trademark. In Pakistan the trademarks are regulated by the TM Ordinance and for the purpose of revocation of the trademark, the procedure is provided in Section 73 of the TM Ordinance, which is distinct from the procedure and approach of the EU. Hence, we are



of the firm view that the case law relied upon by the Respondent No. 2 from European Union is of no relevant for the purposes of instant proceedings.

32. The Respondent No. 2 has not placed any document on the record which may substantiate the stance taken by it in the hearing i.e. no action was initiated by the Respondent No. 2 under the relevant provision of Section 73 of the TM Ordinance nor was any application filed by them. Since, the jurisdiction of the Commission is only limited to the extent of the 'Deceptive Marketing Practices', hence, we will constrain ourselves only to the extent of violation of Section 10 of the Act. The Respondent No. 2 is at liberty to take that stance before the Trade Marks Registry in accordance with the procedure provided in TM Ordinance. Until any direction is issued by the authority concerned vis-à-vis the generic nature of the word 'NIMCO' we cannot entertain the defense taken by the Respondent No. 2; as in the absence of any judicial pronouncement, it holds no value.
33. Foregoing in view, we are of the view that the Complainant got its trademarks registered as depicted in Para 4 above, and is taking measures for its protection in accordance with law. We further hold that the word 'NIMCO' is not a general descriptive word and the Complainant is right in its steed to take appropriate actions in accordance with law to safeguard rightfully earned goodwill, reputation and investments.

Issue no. 4: Whether the Respondents have violated Section 10 of the Competition Act?

34. The final issue that needs consideration is; whether the Respondents have violated Section 10 of the Act. For ease of reference, section 10 of the Act is reproduced herein under;

"10. Deceptive Marketing Practices: ----- (1) No undertaking shall enter into deceptive marketing practices

(2) The deceptive marketing practices shall be deemed to have been resorted to or continued if an Undertaking resorts to

(a): the distribution of false and misleading information that is capable of harming the business interests of another undertaking.




(b): the distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, suitability for use, or quality of goods;"

(c): false or misleading comparison of goods in the process of advertising or

(d): fraudulent use of another's trademark, firm name, or product labeling or product packaging."

35. Recourse, in this regard, has to be made to the evidence available on the record. The Complainant produced his original packaging, as well as Respondent's packaging, along with his complaint for the Commission to make comparative analysis between the both. The trademarks and the packaging of the Complainant and Respondent No. 1 for ease of reference is reproduced herein below:

Firm name and NIMCO logo of Complainant and Respondent No.1

COMPLAINANT	RESPONDENT
<p>Firm Name NIMCO CORNER</p>	<p>Firm Name MR. NIKCO CORNER</p>
<p>Logo in English</p> 	<p>Logo in English</p>  <p>("R" sign is a false and misleading statement that the Respondent's logo is registered.)</p>
<p>Logo in Urdu</p> 	<p>Logo in Urdu</p>  <p>("R" sign is a false and misleading statement that the Respondent's logo is registered.)</p>


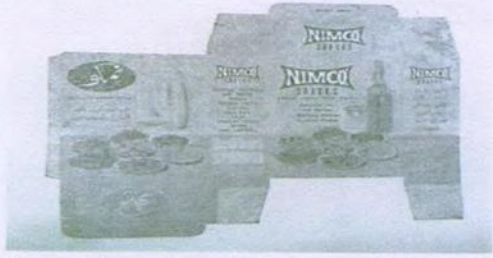



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Trade Marks of Complainant and Respondent No.1.

COMPLAINANT	RESPONDENT
<p>Copies of Trade Marks as Applied</p>  <p>Registered since 1972.</p>  <p>As Registered since 1970.</p>	<p>Copy of Trade Marks as Applied</p>  <p>Pending since 2014.</p>

Packaging of Complainant and Respondent No.1 .

COMPLAINANT	RESPONDENT
<p>Packaging (front)</p> 	<p>Packaging (front)</p> 



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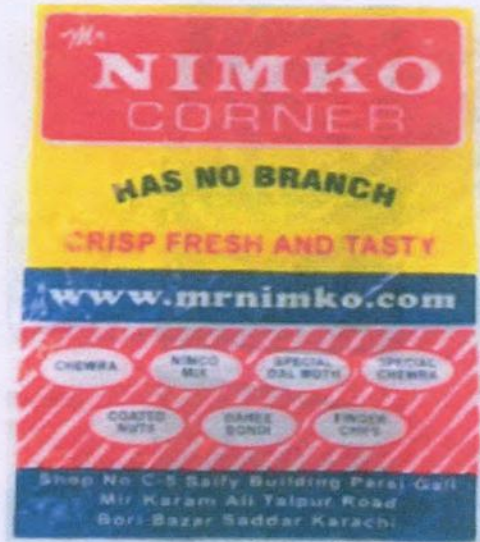
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Close-up



Close-up



Packaging (reverse side)



Packaging (reverse side)



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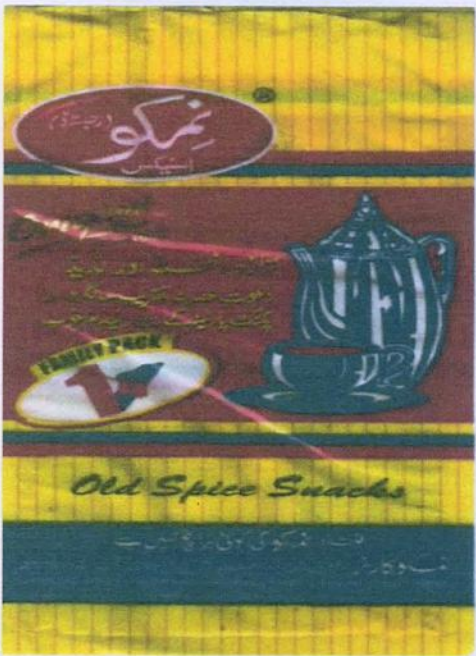
Close-up (reverse side)



Close-up (reverse side)



Packaging (front)



Packaging (front)



36. The Enquiry Report has appreciated the above evidence in the following words:

37. As is clearly evident from the above comparative representations of the Complainant and Respondent No. 1's firm names, packaging and marks the following elements of the Complainant have been copied by Respondent No. 1:



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- *The Respondent No. 1's firm name is Mr. Nimko Corner which is virtually and phonetically identical to the Complainant's firm name Nimco Corner.*
- *The Respondent No. 1 is infringing and passing off the following trade mark elements of the Complainant by using and applying for registration of:*
 - *the words "Nimko Corner" in English and in Urdu which is virtually and phonetically identical to the trade mark NIMCO CORNER, in which the Complainant hold exclusive rights in English and in Urdu.*
 - *the phrases "TAAZA, KHASTA AUR LAZEEZ" and "DAAWAT IWRANA, TAQREEB SAALGIRA AUR PICKNIC PARTIES KE LIYE BEHAD MARGHOOB" which is conceptually, visually and phonetically identical and confusingly similar to the phrases "TAAZA, KHASTA AUR LAZEEZ" and "DAAWAT ISRANA, AUR PICNIC PARTIES KE LIYE BEHAD MARGHOOB" which has been coined and used extensively by the Complainant since 1972.*
 - *The striped device at the bottom of the trade mark and bag is visually and conceptually identical to the striped device developed, designed, registered and used extensively by the Complainant since 1972.*
- *The Respondent No. 1 is copying NIMCO Packaging in the following manner:*
 - *the Respondent No. 1's bag has a red, white and yellow colour scheme, a Mr. Nimco Corner logo mark in red and white on top, the Words "FRESH, CRISP AND TASTY" written in yellow in the centre, then the business' website written in a separate band below and a striped device with the names of Snack Foods written within ovals shapes and the address of the Respondent No.1 provided at the bottom, which is virtually identical to that of the Complainant's bag.*



The packet of the snack foods is also identical to the NIMCO Packaging. In particular the Offending Packaging has the identical colour scheme (red, yellow and blue), structure (overall yellow with the logo in red and white on top, information and tea devices in the center, and seller's

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information in blue at the bottom), elements (saucer and tea cup, size of package) and wording "Nimko Corner", "Original Brand", "Old Spice Crips", "FRESH, CRISPY, TASTY", "TAAZA, KHASTA AUR LAZEEZ" and "DAAWAT ISRANA, AUR PICNIC PARTIES KE LIYE BEHAD MARGHOOB" and names of Snack Foods.

37. The Respondent No. 1, despite service of notice issued by the Office of Registrar in terms of Section 30 of the Act did not avail the opportunity of hearing and after giving them opportunities, in accordance with provisions of Regulation 26(2)(e) of the GE Regulations, we deemed it appropriate to proceed ex-parte against Respondent No. 1 on 05 December 2019.



38. Analysis shows that the product packaging of the Respondent No. 1 is identical to Complainant's packaging in term of color scheme, taglines, shapes, patterns and the firm's name. Further, the Respondent No. 1 has copied exact taglines, their placement, graphical patterns and font style, which gives the impression that Respondent No. 1 are passing them off as Complainant's associated firm or a branch. In addition to that, evidence available on the record shows that Respondent No. 1 has also used shopping bags printed in a manner identical to Complainant's trademark. We acknowledge that free riders seek to take advantage of the reputation attached to third party's trademark, in order to benefit from the attractive force of that trademark, and the efforts expended by the rights holder in creating that attractive force. The Respondent No. 1 in fact is free riding on the Trademark "NIMCO" of the Complainant in order to gain advantage without making any investment and developing its own brand. The conduct of the Respondent No. 1 by imitating the trademark and packaging material of the Complainant is clearly a violation of Section 10 of the Act, in particular Section 10(1) read with Section 10(2)(b) & (d) of the Act. While reaching this conclusion we are guided by **Western Brand Tea vs. Tapal Tea (Pvt.) Limited**, reported as **PLD 2001 SC 14** and **Mehran Ghee Mills (Pvt.) Limited vs. Chiltan Ghee Mills (Pvt.) Limited** reported as **2001 SCMR 967**.

39. The trademarks and the packaging of the Complainant and Respondent No. 2 for ease of reference is compared below:




Firm name and Nimco logo of Complainant and Respondent No. 2

COMPLAINANT	RESPONDENT
<p>Firm Name NIMCO CORNER</p>	<p>Firm Name KARACHI NIMCO</p>
<p>Logo in English</p> 	<p>Logo in English</p> 

COMPLAINANT	RESPONDENT
	

Trade Marks of Complainant and Respondent No. 2.


COMPLAINANT	RESPONDENT
<p>Copies of Trade Marks as Applied</p>  <p>Registered since 1972.</p>	<p>N/A</p>



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COMPLAINANT	RESPONDENT
	

Packaging of Complainant & Respondent No. 2

Image No. 1

COMPLAINANT	RESPONDENT
<p data-bbox="400 1167 683 1205">Packaging (front)</p> 	<p data-bbox="991 1167 1273 1205">Packaging (front)</p> 



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Image No. 2

COMPLAINANT	RESPONDENT
<p style="text-align: center;">Close-up</p> 	<p style="text-align: center;">Close-up</p> 

Image No. 3

COMPLAINANT	RESPONDENT
	







Image No. 4



40. The Enquiry Report with reference to the conduct of the Respondent No. 2 in Para 2.38 thereof is reproduced herein below:

2.38. *As is clearly evident from the above comparative representations of the Complainant and Respondent No. 2's firm names, packaging and marks the following elements of the Complainant have been copied by Respondent no.2:*

- *The Respondent No. 2's firm name is Karachi Nimco which is virtually and phonetically identical to the Complainant's firm name Nimco Corner.*
- *The Respondent No. 2 is infringing and passing off the following trade mark elements of the Complainant by using and applying for registration of:*
 - *the words "Nimko Corner" in English and in Urdu which is virtually and phonetically identical to the trade mark NIMCO, in which the Complainant hold exclusive rights in English and in Urdu.*



the phrases "TAAZA, KHAUSTA AUR LAZEEZ" and "DAAWAT IWRANA, TAQREEB SAALGIRA AUR

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PICKNIC PARTIES KE LIYE BEHAD MARGHOOB" which is conceptually, visually and phonetically identical and confusingly similar to the phrases "TAAZA, KHAUSTA AUR LAZEEZ" and "DAAWAT ISRANA, AUR PICNIC PARTIES KE LIYE BEHAD MARGHOOB" which has been coined and used extensively by the Complainant since 1972.

- *The striped device at the bottom of the trade mark and bag is visually and conceptually identical to the striped device developed, designed, registered and used extensively by the Complainant since 1972.*
- *The Respondent No. 2 is copying NIMCO Packaging in the following manner:*
 - *the Respondent No. 2 's bag has a red, white and yellow colour scheme, a Karachi Nimco logo mark in red and white on top, with "Original since" 1966 falsely written on top left; then the business address and website written below which is virtually identical to that of the Complainant's bag.*
 - *The packet of the Snack Foods is also identical to the NIMCO Packaging. In particular the Offending Packaging has the identical colour scheme (red, yellow and blue), structure (overall yellow with the logo in red with trademark registered sign falsely displayed next to it and blue and white stripes in the middles, red band below containing business address and details); further the identical words, "TAAZA, KHAUSTA AUR LAZEEZ" and "DAAWAT ISRANA, AUR PICNIC PARTIES KE LIYE BEHAD MARGHOOB" are also written in same font.*

2.39. *In view of the above it is obvious that the adoption by the Respondent No. 2 of the virtually identical Offending Firm Name, Impugned Mark and Offending Packaging as that of the Complainants is not a coincidence and that the Respondent No.2 has with full knowledge and mala fide intention copied the Complainant in order to reap benefits and take advantage of the goodwill associated with the long standing use of the Complainant's firm name, NIMCO Packaging and NIMCO trademarks which is likely to cause damage to the Complainant's goodwill and reputation as well as dilute the NIMCO trademarks and*



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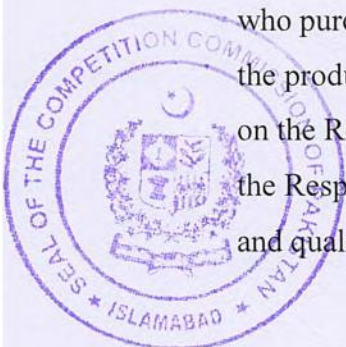
result in financial loss of the Complainant.

41. Analysis of the above comparison shows that the product packaging of the Respondent No. 2 in image No. 1 & 2 are not identical, however, the word “NIMCO” is used in the those packaging. Whereas in image Nos. 3 & 4 the packaging of the Respondent No. 2 is identical to Complainant’s packaging in term of color scheme, taglines, shapes and patterns. Further, in image No. 3 & 4 above, the Respondent No. 2 has copied exact taglines, their placement, graphical patterns and font style, which gives the impression that Respondent No. 2 are passing them off as Complainant’s associated firm or a branch. Though the Respondent No. 2 produced newly designed product packaging during argument, but upon the query raised by the Bench the Respondent admitted that these newly designed packaging is being for last two years. The claim with reference to the use of new packaging is also not substantiated through any independent cogent evidence. Foregoing in view, we are constrained not to consider this evidence while reaching our conclusion *vis-à-vis* the violation of Section 10 of the Act. Our observations on a juxtaposition of the images of the Complainant’s Trade Dress and Respondents Trade Dress are as follows:

- (i). There is no doubt that a pictorial comparison of the Complainant’s Products and Respondent No. 1’s Products and Packaging leads to the obvious conclusion that there exist deceptively confusing similarities in the Complainant’s Trade Dress and the Respondent’s Trade Dress is almost identical to that of the Complainant, which is evident on the packaging.
- (ii). There is no doubt that a pictorial comparison of the Complainant’s Products with Respondent No. 2’s Products and Packaging in image Nos. 3 & 4 leads to the obvious conclusion that there exist deceptively confusing similarities in the Complainant’s Trade Dress and the Respondent No. 2’s Trade Dress.
- (iii). The ordinary consumer, specifically the illiterate, would not be able to distinguish between the products origin but for the brand names evident on the packaging. Even otherwise, the confusing similarities would mislead the consumer into believing that the source/ origin of the Respondents Products are in fact the Complainant.



42. In short, there is no doubt from the visual observation of pictorial illustrations placed on the record in this matter, that any ordinary consumer, would at first instance be deceived as to the origin of the products at the time of exercising a choice of purchase. In this regard we deem it appropriate to refer to the judgment of **Delhi High Court reported as Colgate Palmolive Co v Anchor Health and Beauty Care Pvt Ltd, 2003 (27) PTC 478 Del**, wherein Colgate sought an interim injunction against the Anchor Health's use of the trade dress and colour combination of red and white in relation to identical products (tooth powder), even though the rival marks were completely different. The court held that: "*If the first glance of the article... gives the impression as to deceptive or near similarities in respect of these ingredients, it is a case of confusion and amounts to passing off one's own goods as those of the other with a view to encash upon the goodwill and reputation of the latter.*" (emphasis added)
43. In view of the foregoing, we are fortified in our view that the Respondents are responsible for and have in fact resorted to free riding and parasitic copying. Marketers traditionally focus on designing advertising campaigns and other promotional strategies to promote a brand name. However, with evolving consumer preferences and laws, presentation; trade dress have become just as essential for making products and services distinctive and for building brand recall. The cultural diversity of the Pakistan market makes a compelling case for the importance of product identification by packaging and visual impression. This has resulted in third parties creating lookalikes of popular products with similar packaging in order to grab consumers' attention and generate demand for their own products in the market. In our considered view, the consumers are clearly susceptible and at a serious risk of falling prey to deceptive confusion pertaining to the origin and quality of the products, due to the striking similarity in the Complainant's Trade Dress and the Respondents Trade Dress.
44. As established has been established in the preceding paragraphs, the Respondents' Trade Dress and overall impression of the product labelling and packaging is deceptively similar to that of the Complainant's Trade Dress. An ordinary consumer who purchases the Respondent's Product off the shelf is highly likely to be deceived by the product packaging, logo and the get up of the product. The misleading information on the Respondent's Products is in the form of a deceptive impression disseminated by the Respondent's Trade Dress, which is likely to mislead the consumer as to the origin and quality of the same being linked to that of the Complainant. The Respondents have



failed to discharge the burden of providing any level of substantiation for the authenticity of its Trade Dress to the effect that it would not cause a misleading impression that Respondent's Products originate from the Complainant and hence match the quality of the Complainant's Products. This deceptive similarity in the Respondents' Trade Dress and the Complainant's Trade Dress has the potential to directly or indirectly affect the transactional decision of the consumers to buy the Respondents Product on the misleading pretense as to origin/ place of production and quality of the product and hence is materially deceptive.

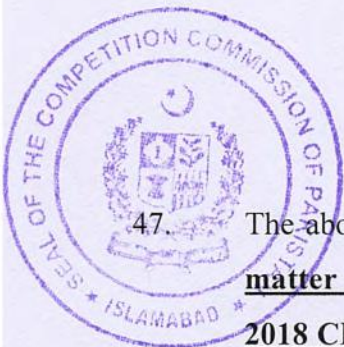
45. Therefore, in line with its previous decisions, the Commission consider such similarities as "free riding" or "parasitic copying" or "copycat", which is already described **in the matter of Show Cause Notice issued to M/s Rahim Foods Limited**, reported as **2016 CLD 1128**, it was held therein;

"Indeed parasitic copying typically consists in reproducing the main presentational features of market leading products (such as the shape of the product or of its packaging, colour combination and graphic arrangement) but usually there is just enough difference to avoid a clear cut trademark infringement. Still they often generate deception or confusion among consumers."

46. Furthermore, while describing the effect of such copying, the Commission also held that

"...the copycat incurs minimal cost and in fact none of the cost of investment and innovation is design that the market leader has spent to build goodwill and reputation of its brand assets in the relevant market. Hence, where product differentiation is insufficient, such a practice on part of the copycat has fatal consequences of business of the market leader."

47. The above was further re-affirmed by the Commission in another Order i.e. **In the matter of Show Cause Notice issued to M/s Shainal Al-Syed Foods**, reported as **2018 CLD 1115**.

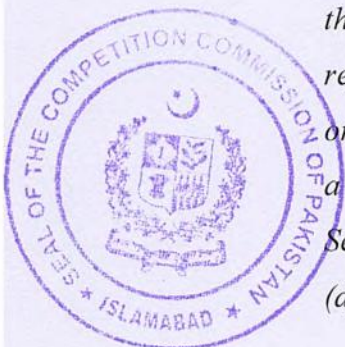


48. Furthermore, another fact worth mentioning here is that the Respondent No. 1 has mentioned the sign “®” on their packaging despite the fact that they have no registered trademark or any connected right. This is absolutely false, misleading information and without substantiation on the part of Respondent No. 1.

49. With reference to the information being capable of harming the business interest of other undertakings, we would like to refer to **In the matter of Show Cause Notice issued to M/s Shainal Al-Syed Foods**, reported as **2018 CLD 1115**, wherein it was held that:

44. *With respect to the term “business interest” in clause (a) of subsection (2) of Section 10 of the Act, the Commission observed **in the matter of Violation of Trade Mark of M/S. DHL Pakistan (Pvt.) Ltd** reported as **2013 CLD 1014** that, ‘it is important to recognize that part of any business’ identity is the goodwill it has established with consumers, while part of a product’s identity is the reputation it has earned for quality and value’.*

45. *As per the ruling laid down by the Commission in the **2016 CLD 1128**, “in the event that there exists a contravention of Section 10(2)(d) by an undertaking, a concurrent violation of Section 10(2)(a) is also made out”. Furthermore, as established above, copycat packaging, being a practice that falls within the ambit of clause (d) of subsection (2) of Section 10 of the Act, in itself also amounts to the dissemination of misleading information to the public as it amounts to an unfair and deceptive trading practice. The unavoidable consequence of the dissemination of such information is that it is capable of harming the business interest of and resulting in a serious injury to competitors whose product packaging and labelling has been copied in terms of the goodwill that the competitor has established in the market and reputation it has earned for the quality of its product. It is also placed on record that clause (a) of subsection (2) of Section 10 of the Act has a much broader scope than clauses (b) & (d) of subsection (2) of Section 10 of the Act and therefore, a contravention of clauses (b) & (d) of subsection (2) of Section 10 of the Act will almost in every*



circumstance lead to a consequent contravention of clause (a) of subsection (2) of Section 10 of the Act, unless there exist exceptional circumstances in a particular case that warrant otherwise.

46. *Based on the above, the Commission is of the considered opinion that, Respondent's practice of parasitic copying of the Complainant's Trade Dress, which appreciably impairs the consumer's ability to make an informed decision due to confusing similarities between the Respondent's Products and the Complainant's Products, being inherently deceptive, is in fact capable of harming the business interest of the Complainant*

50. From detailed review of the above, we have reached a conclusive finding that the Respondent No. 1 & Respondent No. 2, by using the trademark similar to that of the Complainant, copying the packaging material, graphical representation, and imitating the entire trade dress of the Complainant have resorted to deceptive marketing practices in violation of Section 10 of the Act, read with Sections 10(2)(a), (b) & (d) of the Act.

REMEDY AND PENALTY

51. Before moving on to consider imposing penalty for the violations as determined in the preceding paragraphs of our Order, we would like to stress that the law governing the trademark jealously protects the registered trademark for the growth of healthy competition in trade, commerce, industry and those who have invested their money, labour and skills for earning a remarkable reputation should not be allowed to be exploited by rivals who venture to take benefit of the earned reputation by a registered trademark. The objects/ intention of the Legislature, while enacting the trademark, has been primarily focused towards investment and innovation leading to elimination of chances of confusion and deception.

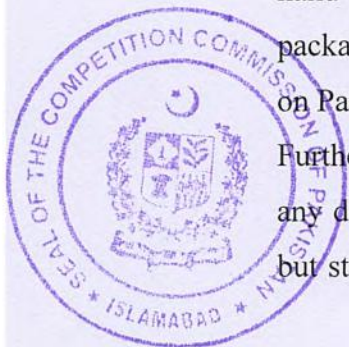
52. We also would like to refer to **In the matter of Show Cause Notice issued to M/s Shainal Al-Syed Foods**, reported as **2018 CLD 1115**, wherein it was held:

48. *In order to impose any penalty in the instant matter and remedy the situation we deem it appropriate to highlight the importance*



of a 'Trade Dress', which in Pakistan are not taken into account and packaging and products are often created by borrowing successful features from competitors, in order to grab consumers' attention and generate demand for their own products in the market. We are conscious of the fact that with the dramatic development of digital communications and network technologies, and as global distribution channels enable businesses to market themselves to a worldwide audience, protecting and enforcing marks, trade dress, product designs and brand identities is of crucial importance. As these intangible assets embody valuable goodwill and serve as a distinct source identifier for the products and services of the business, in this environment, such assets continue to take on greater significance in developing and maintaining brand integrity, reputation and recognition for the business. This enables people with skill and enterprise to produce and market goods and services in fair conditions, thereby facilitating international trade. Hence, the practice of parasitic copying of the trade dress, which appreciably impairs the consumer's ability to make an informed decision due to confusing similarities between the original and copied one, is to be discouraged.

53. We note that during the enquiry as well as during the proceedings before the Commission the Respondents have baldly admitted the use of Complainants trademark and trade dress, and instead of correcting their behavior was adamant on justifying their conduct by raising misplaced and unsubstantiated submissions. While, the conduct of part of Respondent No. 1 is more severe i.e. marking it with ® and identical packaging and placement of similar logos, the Respondent No. 2 on the other hand though is using different packaging as shows in image No. 1 & 2, but the packaging in image No. 3 & 4 gives an impression of parasitic copying or free riding on Part of the Respondent No. 2 on the trademark and packaging of the Complainant. Further, the Respondent No. 1 failed to even avail the opportunity of hearing or present any defence in lieu of their conduct, whereas, Respondent No. 2, though irrelevant, but still managed to appear before us and put up a defence and was also inclined to




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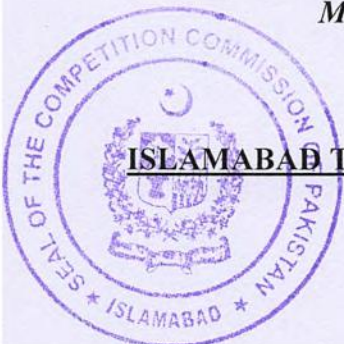
change its packaging. Hence, keeping in view the above, we are constrained to impose a penalty of PKR 25,000,000/- (Rupees Twenty Five Million Only) on Respondent No. 1 and PKR 20,000,000/- (Rupees Twenty Million Only) on Respondent No.2. Both the Respondents are directed to deposit the penalty imposed with the Registrar of the Commission within sixty (60) days from the date of this Order.

54. The Respondents are hereby reprimanded to ensure responsible behavior in future with respect to the marketing of their business and are directed to cease and desist from the use of the word "NIMCO", trademark, trade dress and packaging material similar to that of the Complainant's Trade Mark, Trade Dress and packaging material, with immediate effect and not to use it in future. The Respondents are directed to ensure that the products are repackaged in a manner that is distinct in its overall layout, design, shape, size, language and colour scheme so as to be easily distinguishable from the products of the Complainant. The Respondents are also directed to file within sixty (60) days from the date of this Order, the compliance report with the Registrar of the Commission reporting compliance with this Order, to ensure future compliance and not to contravene any provision of the Act, in particular Section 10 of the Act with respect to the subject matter.
55. In case the violation of this Order continues, it is then warranted that each Respondent shall be made further liable under sub-section (3) of Section 38 of the Act to pay an additional penalty amounting to Rs. 1,000,000/- (Rupees One Million Only) each, per day from the date of such violation.
56. In terms of the above, Show Cause Notices No. 14 and 15 of 2019 dated 12 July 2019 are hereby disposed of.


(Dr. Muhammad Saleem)
Member


(Dr. Shahzad Ansar)
Member


(Ms. Bushra Naz Malik)
Member



ISLAMABAD THE 23rd DAY OF DECEMBER 2019